91-1198

No. ——

Supreme Court, U.S.
FILED
JAN 23 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHESAPEAKE WESTERN RAILWAY, *et al.*,
Petitioners,

v.

TAX COMMISSIONER, VIRGINIA DEPARTMENT OF TAXATION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

BETTY JO CHRISTIAN
(Counsel of Record)
TIMOTHY M. WALSH
JERALD S. HOWE, JR.
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-8113

January 23, 1992

(List of Attorneys Continued On Inside Cover)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

Of Counsel:

CHARLES A. HARTZ, JR.
RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY
2134 West Laburnum Avenue
Richmond, Virginia 23227
(804) 257-3235

EVERETT B. GIBSON
EVERETT B. GIBSON LAW FIRM
950 Morgan Keegan Tower
50 N. Front Street
Memphis, Tennessee 38103
(901) 576-8211

JAMES P. PETER
COURTNEY GEORGE HYERS
CSX CORPORATION
1 James Center
901 E. Cary Street
Richmond, Virginia 23219
(804) 782-1422

WILLIAM H. ALLEN
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-5420

HENRY C. WOLF
NORFOLK SOUTHERN CORPORATION
Three Commercial Place
Norfolk, Virginia 23510-2191
(804) 629-2370

JAMES W. MCBRIDE
LAUGHLIN, HALLE, MCBRIDE, LUNSFORD & FLETCHER
1211 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 331-8501

Attorneys for Petitioners

QUESTION PRESENTED

Whether the federal courts have jurisdiction, under the federal statute that prohibits state tax discrimination against railroads, to determine whether a state's property tax valuation methodology results in discriminatory overvaluation of railroad property.

PARTIES TO THE PROCEEDING BELOW AND RULE 29.1 STATEMENT

The parties to the proceeding in the court below were Chesapeake Western Railway; CSX Transportation, Inc.; Interstate Railroad Company; Norfolk and Western Railway Company; Richmond, Fredericksburg and Potomac Railroad Company; Southern Railway Company; William H. Forst, Tax Commissioner, Virginia Department of Taxation, His Successors in Office; David E. Jordan, Assistant Director, Property Tax Division, Virginia Department of Taxation, His Successors in Office; City of Alexandria, Virginia; County Board of Arlington County, Virginia; County of Fairfax, Virginia; County of Prince William, Virginia; and County of Hanover, Virginia. Southern Railway Company has subsequently changed its name to Norfolk Southern Railway Company.

Petitioners before this Court are Chesapeake Western Railway, CSX Transportation, Inc., Interstate Railroad Company, Norfolk and Western Railway Company, Norfolk Southern Railway Company, and Richmond Fredericksburg and Potomac Railroad Company.

The parent company of petitioner Chesapeake Western Railway is petitioner Norfolk and Western Railway Company, whose parent companies are listed below. Chesapeake Western Railway has no subsidiaries.

The parent company of petitioner CSX Transportation, Inc. is CSX Corporation. The subsidiaries of CSX Transportation, Inc. that are not wholly-owned subsidiaries are:

The Akron Union Passenger Depot Company

Allegheny & Western Railway Company (sold to Buffalo & Pittsburgh Railroad, Inc., but shares held in escrow pursuant to escrow agreement)

Augusta and Summerville Railroad Company

The Baltimore and Cumberland Valley Rail Road Extension Company

Beaver Street Tower Company

Central Transfer Railway and Storage Company

Chatham Terminal Company

Clearfield & Mahoning Railway Company (sold to Buffalo & Pittsburgh Railroad, Inc., but shares held in escrow pursuant to escrow agreement)

The Cleveland Terminal & Valley Railroad Company

Dayton and Michigan Railroad Company

Dayton and Union Railroad Company

The Home Avenue Railroad Company

The Lakefront Dock and Railroad Terminal Company

Nicholas, Fayette and Greenbrier Railroad Company

North Charleston Terminal Company

Winston-Salem Southbound Railway Company

Woodstock & Blocton Railway Company

The parent company of petitioner Interstate Railroad Company is petitioner Norfolk Southern Railway Company, whose parent company is listed below. Interstate Railroad Company has no subsidiaries.

The parent company of petitioner Norfolk and Western Railway Company is petitioner Norfolk Southern Railway Company, whose parent company is listed below. The only subsidiary of Norfolk and Western Railway Company that is not a wholly-owned subsidiary is Winston-Salem Southbound Railway Company.

The parent company of petitioner Norfolk Southern Railway Company (formerly known as Southern Railway Company) is Norfolk Southern Corporation. The subsidiaries of Norfolk Southern Railway Company that are not wholly-owned subsidiaries are:

Algers, Winslow & Western Railway Company

Augusta and Summerville Railroad Company

Central Transfer Railway and Storage Company

Chatham Terminal Company (through Central of Georgia Railroad Company)

High Point, Randleman, Asheboro and Southern Railroad Company

Mobile and Birmingham Railroad Company

The North Carolina Midland Railroad Company

The South Western Rail Road Company (through Central of Georgia Railroad Company)

State University Railroad Company

Winston-Salem Southbound Railway Company (through Norfolk and Western Railway Company)

Woodstock & Blocton Railway Company (through The Alabama Great Southern Railroad Company)

Yadkin Railroad Company

The parent company of petitioner Richmond, Fredericksburg and Potomac Railroad Company is RF&P Corporation. RF&P Corporation is a subsidiary of System Holdings, Inc., a corporation wholly owned by Virginia Retirement System, a state pension fund and political subdivision of the Commonwealth of Virginia. Richmond, Fredericksburg and Potomac Railroad Company has no subsidiaries.

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James F. Runke & Alan E. Finder, *State Taxation of Railroads and Tax Relief Programs* (Ralph J. Marcelli ed., 1977) 18

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Chesapeake Western Railway, CSX Transportation, Inc., Interstate Railroad Company, Norfolk and Western Railway Company, Norfolk Southern Railway Company, and Richmond, Fredericksburg and Potomac Railroad Company respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in this case on July 12, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 938 F.2d 528 (4th Cir. 1991), and is reproduced in the Appendix ("App.") at App. 1a to 10a. The unreported opinion of the United States District Court for the Eastern District of Virginia is reproduced at App. 11a to 14a.

JURISDICTION

The judgment of the Court of Appeals was entered on July 12, 1991. A timely petition for rehearing was denied on September 24, 1991. App. 17a. By order dated December 9, 1991, the Chief Justice extended the time for the filing of a petition for certiorari to and including January 23, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTORY PROVISION INVOLVED

Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, 54 (the "4-R Act"), as recodified at 49 U.S.C. § 11503 (1988), is set forth at App. 19a-21a. Further references will be to the statute as recodified; recodification did not effect any substantive changes. *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457 n.1 (1987).

STATEMENT OF THE CASE

The issue presented by this petition is one this Court reserved five years ago: whether section 11503 of Title 49, which prohibits discriminatory taxation of railroads, permits the methodology a state uses for valuing railroad property to be challenged as itself discriminatory. *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 463 n.5 (1987). In *Oklahoma Tax Commission*, this Court held that section 11503 confers jurisdiction on the federal courts to determine whether a state has overvalued railroad property. However, because methodology was not there in issue, the Court expressed no view as to

> whether a railroad may, in an action under § 11503, challenge in the district court the appropriateness of the accounting methods by which the State determined the railroad's value, or is instead restricted to challenging the factual determinations to which

> the State's preferred accounting methods were applied.

Id.

The way the court below answered that question opens a gaping hole in the statute, one that threatens its ability to protect railroads against the chronic problem of discriminatory state taxation. The Fourth Circuit held that federal courts have no jurisdiction under section 11503 to hear a claim of tax discrimination if that claim involves a challenge to the state's valuation methods. App. 10a. Thus, even if the methodology selected by a state yields obvious and substantial discrimination against railroads, there would be no recourse under section 11503.

A. The Background of Section 11503

After close study of the distressed financial condition of the Nation's railroads, Congress enacted wide-ranging remedial measures in the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (the "4-R Act"). A key component of that statute was relief from state tax discrimination, which Congress estimated had resulted in "railroads [being] over-taxed by at least $50 million each year." *Oklahoma Tax Commission*, 481 U.S. at 454 (citing H.R. Rep. No. 725, 94th Cong., 2d Sess. 78 (1975)).

Section 11503 adopted an antidiscrimination policy designed to curb the "temptation [on the part of state and local governments] to excessively tax nonvoting, nonresident businesses in order to subsidize general welfare services for state residents." *Western Airlines, Inc. v. Board of Equalization*, 480 U.S. 123, 131 (1987). The statute has been used as the model for similar measures designed to protect other interstate carriers.[1]

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[1] After 1976, Congress enacted parallel statutes for trucking companies, Motor Carrier Act of 1980, Pub. L. No. 96-296, § 31, 94 Stat. 793, 823 (codified at 49 U.S.C. § 11503a (1988)); bus companies, Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, § 20, 96

Simply stated, section 11503(b) forbids a state or locality to:

(1) assess railroad property at a value that bears a higher ratio to the true market value of such property than the ratio that the assessed value of all other commercial and industrial property bears to the true market value of such property;

(2) levy or collect any tax based on such an assessment;

(3) levy or collect any ad valorem tax on railroad property at a higher rate than the rate generally applicable to other commercial and industrial property; or

(4) impose any other tax that discriminates against a railroad.

Because Congress was dissatisfied with the remedies available in state courts, section 11503(c) gives federal courts jurisdiction to prevent state tax discrimination against railroads notwithstanding the Tax Injunction Act, 28 U.S.C. § 1341 (1988). To protect the interests of the states, Congress gave them a three-year grace period to bring their taxation practices into compliance, 90 Stat. 54, and specified that only assessment ratio discrimination of over five percent could be enjoined by federal courts. 49 U.S.C. § 11503(c).

Although some states promptly instituted reforms, others sought to perpetuate tax discrimination against railroads by a variety of means. One by one, most of those devices aimed at thwarting the relief Congress granted in section 11503 were prohibited by the federal courts.[2]

Stat. 1102, 1122 (codified at 49 U.S.C. § 11503a (1988)); and airlines, Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, tit. 5, § 532, 96 Stat. 671, 701 (codified at 49 U.S.C. app. § 1513(d) (1988)).

[2] *E.g., General Am. Transp. Corp. v. Kentucky*, 791 F.2d 38 (6th Cir. 1986) (Kentucky: railroad cars classified as public utility

In 1987, this Court resolved one recurring issue presented by the states' efforts: whether section 11503 reaches allegations that railroad property had been valued in excess of its true market value, while other commercial and industrial property was valued at or below true market value. In *Oklahoma Tax Commission*, the railroad claimed that the value of its property had been artificially inflated in the state's property tax assessment. In response, the state argued that such "overvaluation" claims were outside the scope of the statute.

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property and taxed at a higher rate of assessed value); *Burlington N. R.R. v. Bair*, 766 F.2d 1222, 1224-25 (8th Cir. 1985) (Iowa: taxation of railroad personal property without benefit of rollbacks and credits accorded to other personal property); *Louisville & N. R.R. v. Department of Revenue*, 736 F.2d 1495 (11th Cir. 1984) (Florida: tax benefit accorded to owners of other commercial and industrial property, but not to railroads); *Atchison, T. & S.F. Ry. v. Lennen*, 732 F.2d 1495, 1499 (10th Cir. 1984) (Kansas: railroad real property assessed annually, while other commercial and industrial real property assessed less frequently); *Clinchfield R.R. v. Lynch*, 700 F.2d 126, 130 (4th Cir. 1983) (North Carolina: railroad property assessed annually, while other real property reappraised and reassessed only every eight years); *Trailer Train Co. v. State Bd. of Equalization*, 697 F.2d 860 (9th Cir.) (California: tax rates higher on private rail cars than on other commercial and industrial property), *cert. denied*, 464 U.S. 846 (1983); *Alabama Great S. R.R. v. Eagerton*, 663 F.2d 1036 (11th Cir. 1981) (Alabama: license tax on railroads); *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204 (8th Cir.) (North Dakota: taxation of railroad personal property but not other commercial personal property, and discriminatory assessment of railroad property), *cert. denied*, 454 U.S. 1086 (1981); *Burlington N. R.R. v. Bair*, 648 F. Supp. 91 (S.D. Iowa 1986) (Iowa: overvaluation of railroad property); *Atchison, T. & S.F. Ry. v. Arizona*, 559 F. Supp. 1237 (D. Ariz. 1983) (Arizona: improper classification of "other" commercial and industrial property relative to railroad property); *Louisville & N. R.R. v. Louisville Tax Comm'n*, 498 F. Supp. 418 (M.D. La. 1980) (Louisiana: railroad property classified as "public service" property and assessed at 25% of true market value, while "other" property assessed at 15% of value).

After reviewing the text, structure, and background of the statute, this Court held that section 11503 does reach claims of tax discrimination resulting from the overvaluation of railroad property. As the Court explained, in order to perform the comparison of assessment ratios required under section 11503(b)(1), "it is necessary to determine what the 'true market values' are." *Oklahoma Tax Commission*, 481 U.S. at 461. The Court thus squarely rejected the contention "that whatever the State determines the value of the railroad to be, the resulting assessment ratio is not subject to further judicial scrutiny." *Id.* at 461-62.[3]

Footnote 5 of the *Oklahoma Tax Commission* opinion, however, observed that in that particular case the railroad had "not challenged the valuation methodology employed by respondents in determining the value of petitioner's railroad; petitioner's sole challenge is to the application of that methodology." *Id.* at 463 n.5. As a result, the Court "express[ed] no view" as to whether a challenge to a state's methodology would be within the reach of section 11503. *Id.*

Even after *Oklahoma Tax Commission*, some states have continued imposing discriminatory taxes on railroads, again seeking to conceal or defend such taxes in a variety of novel ways.[4] One of the most fertile areas

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[3] As a fallback, the states argued that only *intentional* overvaluation was prohibited by section 11503. The Court also rejected that theory, holding that the "interpolation of an intent requirement draws no support from the statute's language and is inconsistent with its expressed purpose." *Id.* at 464.

[4] *See, e.g., Trailer Train Co. v. State Tax Comm'n*, 929 F.2d 1300 (8th Cir.) (Missouri: private car tax imposed solely on freight line companies), *cert. denied*, 112 S. Ct. 169 (1991); *Burlington N. R.R. v. City of Superior*, 932 F.2d 1185 (7th Cir. 1991) (Wisconsin: occupational tax on owners and operators of "iron ore concentrates docks" affected only railroads as sole operators of such docks); *Trailer Train Co. v. Leuenberger*, 885 F.2d 415, 416 (8th Cir. 1988) (Nebraska: tax on personal property of railroads, while exempting majority of commercial and industrial personal property in state), *cert. denied*, 490 U.S. 1066 (1989); *Kansas City S. Ry. v. McNamara*,

of litigation is the issue left open by footnote 5: states have been seeking dismissal of section 11503 claims on the ground that they involve challenges to methodology and thus allegedly lie beyond the reach of the statute.

B. Virginia's Taxation of Railroad Property

In Virginia, railroads are subject to a property tax, assessed centrally but collected by the various cities and counties. From early in this century until the 1984 tax year, assessment responsibility was assigned to the Virginia State Corporation Commission ("VSCC"), which used what it termed an "inventory and summation" method of valuing railroad property. App. 2a-3a.

Under the VSCC method, railroad land is valued based on the use and value of the land adjacent to it. App. 2a.[5] Because railroad rights-of-way often extend uninterrupted for many miles, this "across-the-fence" approach requires that a rail yard or corridor be artificially divided into "parcels" and each resulting parcel compared to the property next to, or across the fence from, it. For railroad property other than land, including roadway, track and operating improvements, value is calculated based on its original cost less depreciation. App. 2a-3a. For a given segment of railroad property, these two approaches are combined. For instance, the depreciated cost of rail and ties is added to the value of railroad land, even though that land has been valued under the across-the-fence approach on the basis of a presumed non-railroad use. *See* App. 2a-3a.

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817 F.2d 368 (5th Cir. 1987) (Louisiana: tax on the intrastate gross receipts of "public utilities" included only railroads and a few other business taxpayers); *ACF Indus. v. California State Bd. of Equalization*, No. C-89-3449 (N.D. Cal. filed Sept. 13, 1991) (order) (California: true market value of railroads overstated because of chosen valuation methodology and its erroneous application).

[5] Virginia also draws a distinction between operating and non-operating land for purposes of railroad property valuation, but non-operating land is not at issue in this case.

Railroads have challenged Virginia's valuation of their property in state court, with little or no success.[6] In 1984, the Virginia General Assembly re-assigned responsibility for assessment of railroad property to the Virginia Department of Taxation ("VDOT"). After a study of the valuation process, VDOT concluded that the inventory and summation method did not determine the true market value of railroad property, and therefore decided to abandon that method.[7] In its place, VDOT adopted a unitary valuation methodology, based principally on capitalized income, similar to the methods used by most other states.[8] That capitalized income approach was also similar to the way local tax assessors in many states value other commercial and industrial property, an approach recognizing that "[i]ncome-producing property is typically purchased for investment purposes" so that "earning power is the critical element that affects the property's value."[9]

Dissatisfied with the lower tax revenues they received as a result of the change, the City of Alexandria and the

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[6] *E.g., Richmond, F. & P. R.R. v. State Corp. Comm'n*, 230 Va. 260, 336 S.E.2d 896 (1985); *City of Alexandria v. Richmond, F. & P. R.R.*, 223 Va. 293, 288 S.E.2d 457 (1982); *Richmond, F. & P. R.R. v. State Corp. Comm'n*, 219 Va. 301, 247 S.E.2d 408 (1978); *Norfolk & W. Ry. v. Commonwealth*, 211 Va. 692, 179 S.E.2d 623 (1971); *Southern Ry. v. Commonwealth*, 211 Va. 210, 176 S.E.2d 578 (1970); *Richmond, F. & P. R.R. v. Commonwealth*, 203 Va. 294, 124 S.E.2d 206 (1962).

[7] App. 3a; *see* App. 27a (David E. Jordan Deposition at 24-25 (Sept. 14, 1990)).

[8] App. 3a; *see County Bd. v. Virginia Dep't of Taxation*, 240 Va. 108, 393 S.E.2d 194, 196-97 & n.4 (1990). Most states that impose a property tax on railroads value the railroad as a whole and then apportion that value to the states and localities in which the railroad operates. *See Oklahoma Tax Commission*, 481 U.S. at 459; *see also infra* at 17-18 & n.20 (various approaches to calculating full system value).

[9] American Institute of Real Estate Appraisers, *The Appraisal of Real Estate* 333 (8th ed. 1983).

County of Arlington contested the new methodology. In a case arising solely under Virginia law and not under section 11503, the Virginia Supreme Court held that use of a unitary approach to valuation was impermissible under the Virginia Constitution. *County Bd. v. Virginia Dep't of Taxation*, 393 S.E.2d 194 (Va. 1990).

Thereafter, VDOT made no apparent effort to identify a methodology that would both satisfy state constitutional requirements and produce non-discriminatory valuations of railroad property. Instead, on July 18, 1990, it simply reverted to the previously discarded inventory and summation methodology, with its higher assessed values. App. 3a.

C. The Proceedings Below

On August 24, 1990, petitioners filed this action in the United States District Court for the Eastern District of Virginia. Invoking federal jurisdiction under section 11503 and seeking injunctive relief, they alleged that valuations produced by Virginia's reestablished inventory and summation methodology would inevitably result in tax discrimination against the railroads for the tax year 1990, as to which railroad property assessments were to be announced in September 1990. While the action was originally brought against VDOT, the local jurisdictions that are respondents in this Court were permitted to intervene as defendants.

Specifically, petitioners alleged that Virginia's reinstated inventory and summation method would result in the valuation of their railroad property at levels well in excess of true market value—at 349 percent of true market value in the case of one petitioner. Because other commercial and industrial property in Virginia is concededly assessed at or below true market value, the excessive valuation of railroad property would violate section 11503.

Both VDOT and the intervenor local jurisdictions answered with denials and filed motions for summary judg-

ment, arguing that petitioners could not challenge Virginia's methodology. Opposing those motions, petitioners pointed to discovery materials showing that Virginia's railroad taxation methodology would produce assessment discrimination prohibited by section 11503.

Petitioners cited in particular the deposition testimony of defendant David Jordan, Assistant Director of VDOT's Property Tax Division, who had held direct responsibility for property tax assessment of railroads since 1984. Mr. Jordan testified that for the relevant tax year, Virginia's "*inventory and summation assessments will be in excess of what, in my personal opinion, would be the market value of* [*the petitioners'*] *rail systems.*" [10] The parties agreed "that all other property in the state is assessed at, or below, the true market value." App. 5a. Mr. Jordan concluded that in his view, the differential between the respective assessment ratios for railroad and for other commercial and industrial property would exceed five percent. App. 31a (Jordan Dep. at 40).

The district court granted the motions for summary judgment, stating that "the language and legislative history of [section 11503] make clear that it does not impose a particular method of taxation on the state . . . ." App. 13a.[11] Petitioners then appealed to the Fourth Circuit, which affirmed.

The Fourth Circuit recognized that the petitioners' allegations of substantial, methodology-driven overvaluation of their railroad property would, if proven, establish discrimination. As the court below stated:

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[10] App. 30a (Jordan Dep. at 39) (emphasis added). Mr. Jordan gave specific reasons for his conclusion, pointing to several analytical deficiencies in Virginia's inventory and summation approach. *See* App. 11a-12a, 25a-26a, 28a-29a (Jordan Dep. excerpts).

[11] The district court ruled from the bench on September 20, 1990, then issued a memorandum opinion and final judgment order dated October 3, 1990.

> If the railroads are correct, this means that the ratio of assessed value to true market value for railroad property is therefore greater than one. The parties agree that all other property in the state is assessed at, or below, true market value.

App. 5a. Nonetheless, the Court of Appeals held that section 11503 "does not provide a basis for parties to challenge a state's preferred accounting method." App. 5a. On this issue, the court found the statute itself to be ambiguous and the legislative history to be "thin." App. 6a. It consequently turned to other considerations, resting its decision primarily on the "general proscription on federal interference in state taxation decisions" and on its perception of the "difficulty of judicial enforcement of any alternative understanding" of section 11503. App. 7a.[12]

REASONS FOR GRANTING THE WRIT

The decision below creates an expansive exception to the prohibitions on discriminatory state taxes that Congress mandated in section 11503. It is an open invitation for state tax officials to devise discriminatory methods for valuing railroad property—an invitation that will be particularly seductive in this time of straitened public budgets and acute political aversion to general tax increases. If this discrimination is allowed to go unchecked, the prohibitions that Congress enacted in section 11503 will be readily evaded and deprived of all practical effect.

The court below held that section 11503 does not permit federal courts to entertain challenges to discriminatory state methods of valuing railroad property. In doing so, it purported to resolve the issue this Court reserved in *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S.

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[12] Subsequent to the Fourth Circuit's decision, petitioner Richmond, Fredericksburg and Potomac Railroad Company sold its railroad operating assets to an affiliate of petitioner CSX Transportation, Inc., and no longer engages in providing rail service.

454, 463 n.5 (1987). The Fourth Circuit's decision, however, finds no support in the statute.

Congress enacted section 11503 to end the long and persistent history of state tax discrimination against railroads. Railroads have always been obvious targets, as taxes could be imposed on them with little risk of voter retaliation. Neither state court review nor periodic review by this Court in constitutional cases had been effective in restraining such discrimination. When Congress took action, after fifteen years of study, it legislated comprehensively: the text, structure, and history of section 11503 all manifest the goal of ending *all* forms of state tax discrimination against railroads.

Early decisions applying section 11503 invalidated the more obvious forms of property tax discrimination. Some states then turned to what they may have viewed as a subtler form of discrimination—overvaluing railroad property—and argued, in the teeth of the statutory terms, that a state's valuation of railroad property was immune from scrutiny under section 11503. This Court rejected that argument in *Oklahoma Tax Commission*, holding that section 11503 means what it says: it forbids a valuation of railroad property that is disproportionately high in relation to true market value as compared with the valuation of other commercial and industrial property. 481 U.S. at 461.

There is no basis in the statute's text, context, purpose, or history for excepting a disproportionately high valuation that results from a state's choice of valuation methodology rather than from its application of that methodology. The Fourth Circuit, however, has endorsed just such an exception, one so elastic that it could well become a black hole that swallows much of the protection the statute now affords. If states can extract disproportionate tax revenues from railroads and other interstate carriers by the simple expedient of devising a methodology that leads

to the overvaluation of their property, the comprehensive protection that Congress sought to guarantee will be lost.

The violence that an exception for "methodological" discrimination will do to the statute—coupled with the lack of any genuine distinction between methodology and application in this context—has led other courts to different conclusions than those below. The Court of Appeals for the Eighth Circuit has declined to adopt such a distinction, expressing serious doubt as to its validity. *Burlington N. R.R. v. James*, 911 F.2d 1297, 1301 (8th Cir. 1990). Other courts have already seconded the Eighth Circuit's view.[13] However, two district courts have seized on this questionable distinction to dispose of cases brought under section 11503.[14] This divergence, taken with the mischief that will result if the Fourth Circuit's rule is allowed to stand as an enticement to state and local budget makers, argues strongly for this Court to resolve the issue now, in the only way the text of section 11503 permits it to be resolved.

I. THE FOURTH CIRCUIT WRONGLY DECIDED AN ISSUE OF CRITICAL IMPORTANCE TO SECTION 11503'S PROHIBITION OF STATE TAX DISCRIMINATION AGAINST RAILROADS

A. Immunizing Discriminatory State Tax Methodologies From Challenge Would Defeat the Statute

After studying the problem for over fifteen years, Congress was well aware in 1976 of the variety and per-

[13] *ACF Indus. v. California Board of Equalization*, No. C-89-3449, slip op. at 27 n.4 (N.D. Cal. Sept. 13, 1991) (copy of opinion lodged with the Court); *see also CSX Transp. v. Forst*, No. 3:91CV0048, 1991 U.S. Dist. LEXIS 16355 (E.D. Va. Nov. 6, 1991) (copy of opinion lodged with the Court).

[14] *Union Pac. R.R. v. State Tax Comm'n*, 716 F. Supp. 543, 552 (D. Utah 1988); *Burlington N. R.R. v. Department of Revenue of the State of Washington*, Nos. C89-518(T)WD & C90-5417(T)WD, slip op. at 6-7 (W.D. Wash. Nov. 27, 1991) (copy of opinion lodged with the Court).

sistence of state tax discrimination against railroads, and the statute it enacted was a comprehensive one. Section 11503 deals extensively with state and local property taxes, which were the most common means of tax discrimination against the railroads. The statute prohibits the assessment of railroad property at a value disproportionate to the assessment of other commercial and industrial property, 49 U.S.C. § 11503(b)(1); the levy or collection of a tax based on a prohibited assessment, *id.* § 11503(b)(2); and the taxation of railroad property "at a tax rate that exceeds the tax rate applicable to commercial and industrial property" in the same taxing jurisdiction, *id.* § 11503(b)(3). It then goes on to prohibit *any other tax* that discriminates against a railroad. *Id.* § 11503(b)(4).[15]

The entire structure of the statute manifests its intent to prohibit *all forms* of state tax discrimination against railroads. To permit discriminatory taxation merely because it results from the state's choice of methodology would read an implied exception into subsection (b)(1) and turn a blind eye to the catch-all prohibition of subsection (b)(4).[16] In sum, "[a]doption of [the decision below] would require amendment rather than construc-

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[15] As originally enacted, this catch-all subsection prohibited "any other tax which results in discriminatory treatment" of a railroad. 90 Stat. 31, 54 (1976). As re-codified, the reference is to "another tax that discriminates against" a railroad. 49 U.S.C. § 11503(b)(4). Subsection (b)(4) has been interpreted to apply to property taxes as well as other types of taxes. *E.g., ACF Indus. v. Department of Revenue*, 946 F.2d 1414, 1422 (9th Cir. 1991); *Trailer Train Co. v. State Bd. of Equalization*, 710 F.2d 468, 472 (8th Cir. 1983); *Alabama Great S. R.R. v. Eagerton*, 663 F.2d 1036, 1040-41 (11th Cir. 1981).

[16] A catch-all makes sense only if Congress intended a comprehensive prohibition. Had Congress meant to leave a loophole as big as the supposed methodology exception, there would have been little reason for subsection (b)(4): states seeking to evade the statute would have had no need to try other, less obvious types of discrimination.

tion of the statute, and it must be rejected here." *Oklahoma Tax Commission*, 481 U.S. at 463.

The statute's assessment or valuation provision, subsection (b)(1), is necessarily somewhat complex because it deals with the proportionality of four elements. Yet as this Court indicated in *Oklahoma Tax Commission*, 481 U.S. at 461, that provision is unambiguous. As the Court explained, "[s]ubsection (b)(1) forbids any State to 'assess rail transportation property at a value that has a higher ratio to the true market value . . . than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.'" *Id.* (quoting 49 U.S.C. § 11503(b)(1)). The Court found it "clear from this language that in order to compare the actual assessment ratios, it is necessary to determine what the 'true market values' are." *Id.* The position taken by the Fourth Circuit below is little more than an echo of the argument rejected in *Oklahoma Tax Commission*: "in essence that whatever the State determines the value of the railroad to be, the resulting assessment ratio is not subject to further judicial scrutiny in the federal courts." *Id.* at 461-62. Here, as there, that position "depends upon the addition of words to a statutory provision which is complete as it stands." *Id.* at 463.

There is nothing whatever in the statute to suggest that methodology-based discrimination is immune from review. As the United States pointedly observed in the *Oklahoma Tax Commission* case:

> Section [11503] prohibits any overvaluation of railroad property that results from an assessment rule or methodology that—either on its face or as applied—systematically determines excessive values for railroad property.[17]

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[17] Brief of United States as Amicus Curiae In Support of Petition for Certiorari at 11, *Oklahoma Tax Commission*, No. 86-337 (Sept. 1986).

The opposite result would be ironic indeed: a statute that prohibits discrimination in the finer points of property tax valuation but would permit wholesale discrimination through the adoption of result-oriented valuation methodologies.

This case provides a graphic illustration of how a particular valuation methodology can result in discrimination against railroads. Virginia's own chief railroad property tax assessor has admitted that assessments under the inventory and summation approach would—for reasons inherent to that approach—substantially exceed the true market value of petitioners' property. *See supra*, at 10 & n.10. Challenging the *application* of Virginia's chosen methodology, as expressly permitted by *Oklahoma Tax Commission*, cannot reach the root of the discrimination. Virginia's methodology itself is the culprit.

The question before this Court is not, of course, whether Virginia's methodology does or does not discriminate against railroads; it is whether petitioners are entitled to an opportunity to prove that it does. By holding that methodology is not within the ambit of the statute, the Fourth Circuit immunized such discrimination from scrutiny under section 11503. But unless railroads can challenge methods that cause discrimination, the statutory prohibitions will be easy to evade, with the inevitable result of reviving the very discrimination that Congress sought to end.[18]

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[18] As this Court has often observed, a statute should not be interpreted in a way that would make it ineffective. *See, e.g., Secretary of Interior v. California*, 464 U.S. 312, 359 (1984); *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 513 (1981); *United States v. Shirey*, 359 U.S. 255, 259-60 (1959); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 392 (1940); *Graham & Foster v. Goodcell*, 282 U.S. 409, 421-22 (1931).

B. The Fourth Circuit's Reasoning Is Contrary To That Of This Court In Its *Oklahoma Tax Commission* Decision

The Fourth Circuit cited no specific statutory basis for its decision, and although it attempted to draw support from *Oklahoma Tax Commission*, nothing in footnote 5 or elsewhere in that opinion actually lends support to the distinction between methodology and application created below.[19] To the contrary, the Fourth Circuit simply ignored a fundamental point this Court made in *Oklahoma Tax Commission*: that the pertinent language of section 11503 is plain and unambiguous. 481 U.S. at 461. Such plain language cannot bear within it an implied exception as significant and expansive as that announced below.

Rather than looking to the statute's plain language, the Fourth Circuit relied heavily on the "general proscription in the Tax Injunction Act on federal interference in state taxation decisions." App. 6a, 10a. In *Oklahoma Tax Commission*, however, this Court expressly noted that section 11503 "declared an exception from the provisions of the Tax Injunction Act," 481 U.S. at 457-58, and rejected arguments that an injunction against a state tax would offend principles of comity. The Court said that this was among the "policy considerations which may have weighed heavily with legislators," but which the courts "are not free to reconsider." *Id.* at 464.

The court below also adverted to the legislative history of section 11503 and sought support for its decision in fragments of early testimony that the legislation then proposed "would not deal with valuation being standard." App. 6a-7a. But the fact that the statute does not prescribe a single standard methodology is no indication that

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[19] While footnote 5 noted the theoretical possibility of such a distinction, it in no way endorsed one. Indeed, the methodology loophole now claimed to be an integral aspect of section 11503 was virtually invisible for the decade from the statute's passage until this Court posed the hypothetical in *Oklahoma Tax Commission*.

a discriminatory one is to be immunized from review.[20] In addition, the lower court overlooked the fact that these fragments of testimony occurred early in the fifteen-year legislative process, well before the language of the statute was broadened to prohibit any other tax that discriminates against a railroad. *See supra*, at 14 & n.15. In any event, the Fourth Circuit itself recognized the "thinness" of the legislative history, which this Court treated as "inconclusive and irrelevant" in *Oklahoma Tax Commission*. 481 U.S. at 461.

Beyond this, the decision below appears to have turned on the Fourth Circuit's professed concern for "the difficulty of judicial enforcement" of challenges to valuation methodologies, and a belief that courts are ill-equipped to determine true market value, which it described as "inherently an approximation, in some sense a fiction." App. 7a. In this respect, the lower court seems to have been heavily influenced by a single district court decision, *Union Pacific R.R. v. State Tax Comm'n*, 716 F. Supp. 543, 552 (D. Utah 1988). *See* App. 7a-9a.[21] In *Union Pacific*, the Utah district court expounded at length about the difficulties it had encountered in deciding the case on the merits after a six-week trial dominated by expert testimony advancing competing valuation methodologies for railroad property. In the end, the district court held that the state's valuation methodologies were beyond the reach of the statute, "at least as long as the

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[20] For instance, states that calculate railroad property tax based on allocated full system value use a variety of approaches and factors, including capitalized income, stock and debt values, and historical costs. *See generally* James F. Runke & Alan E. Finder, *State Taxation of Railroads and Tax Relief Programs* 23-32 (Ralph J. Marcelli ed., 1977).

[21] The court below also cited with approval *Burlington N. R.R. v. Lennen*, 715 F.2d 494 (10th Cir. 1983), *cert. denied*, 467 U.S. 1230 (1984). *See* App. 6a. *Lennen* was the principal basis for the Tenth Circuit decision that was reversed by this Court in *Oklahoma Tax Commission*.

methodology chosen had a rational basis and was not chosen for a discriminatory purpose." 716 F. Supp. at 553.[22]

But a market value determination under section 11503 is not appreciably different from the valuation determinations routinely made by courts in condemnation, estate tax, shareholder assessment, and other proceedings, where decisions often are based on expert testimony. More important, this Court has already ruled that under section 11503, "it is necessary [for the courts] to determine what the 'true market values' are." *Id.* at 461. The task assigned by Congress cannot be shirked merely because it may not always be an easy one.

C. The Distinction Between Valuation Methodologies and Their Application Is Illusory and Unworkable

With millions of tax dollars at stake, great pressures will be brought to bear on the distinction the Fourth Circuit has drawn between "methodology" and "application." States will make every conceivable effort to funnel borderline cases into the "methodology" zone. But lacking any legislative foundation or analytical basis, the purported distinction is bound to create enormous controversy and confusion.

There are already strong indications that the distinction is unworkable. When the Eighth Circuit examined the issue, it concluded that "in cases like this the line between 'methodology' and 'application' is so thin as to be almost ephemeral." *Burlington N. R.R. v. James*, 911 F.2d 1297, 1301 (8th Cir. 1990) (permitting section 11503 action to proceed). Likewise, one federal district court recently observed that, even though "helped by the

[22] That reasoning is obviously indefensible: the absence of "discriminatory purpose" cannot possibly be determinative in view of this Court's holding that "an intent requirement draws no support from the statute's language and is inconsistent with its expressed purpose." *Oklahoma Tax Commission*, 481 U.S. at 463-64.

expert testimony to date, [the court] can find no clearly objective basis to make a meaningful distinction between methodology and application issues." *ACF Indus. v. California Bd. of Equalization*, No. C-89-3449, slip op. at 27 n.4 (N.D. Cal. Sept. 13, 1991).[23]

Even the district court that granted summary judgment in this case has since had difficulty in applying the distinction adopted by the Fourth Circuit. *See CSX Transp. v. Forst*, No. 3:91CV00488, 1991 U.S. Dist. LEXIS 16355 (E.D. Va. Nov. 6, 1991). The court noted that "[t]he real question presented, of course, is how one makes a distinction between 'method' and 'application.'" *Id.* at *22. It went on to point out that, while under the Fourth Circuit decision Virginia "is free to *choose* its preferred methodology for ascertaining the true market value for railroad property," it "cannot shield itself from any and all challenges to its taxation of railroad property by a blanket statement that such challenges constitute attacks on Virginia's taxation methodology." *Id.* at *22-23 (emphasis added). In light of "the admitted complexity of the issues involved," the court committed the case before it to trial instead of granting summary judgment. *Id.* at *23.

As these cases demonstrate, judicial resources are now being expended on the artificial threshold question whether the alleged tax discrimination results from the "methodology" or the "application" thereof. That effort has been in derogation of the real issue that section 11503 in plain language requires the courts to address: whether railroad property is being assessed in excess of

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[23] The court permitted one methodology challenge to go forward. In an earlier case, the same court had found that "[i]t is readily apparent that the issue of methodology is inextricably bound up in all of plaintiffs' valuation challenges. . . ." *ACF Indus. v. California State Bd. of Equalization*, 653 F. Supp. 390, 394 (N.D. Cal. 1986). *See also Burlington N. R.R. v. Department of Revenue of the State of Washington*, Nos. C89-518(T)WD & C90-5417(T)WD, slip op. at 6-7 (W.D. Wash. Nov. 27, 1991).

its true market value. The decision below thus leads into a fresh thicket of federal litigation over state taxation of railroads, without in any way serving the statute's goals.[24]

II. PROMPT GUIDANCE BY THIS COURT IS NEEDED TO END CONFUSION IN THE LOWER COURTS

The Fourth Circuit is the first court of appeals to adopt the methodology/application distinction advanced by the states. However, the issue had already arisen in the Eighth Circuit, and that court's decision in *Burlington N. R.R. v. James* indicates a very different view.[25]

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[24] The potential for additional litigation does not end with the problems of distinguishing methodology from application. If the exception created by the Fourth Circuit stands, the only way for a railroad to challenge a discriminatory tax methodology in federal court would be on constitutional grounds, as was the case before enactment of section 11503. *See, e.g., Norfolk & W. Ry. v. Missouri State Tax Comm'n*, 390 U.S. 317 (1968).

There is no virtue in returning to that old regime. As the legislative history sets forth, prior to the enactment of section 11503 members of this Court had suggested that comprehensive federal legislation offered the best means to address railroad claims of state tax discrimination. *E.g., Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 477 (1959) (Frankfurter, J., dissenting) ("The solution to these problems [of state taxation of interstate commerce] ought not to rest on the self-serving determination of the States of what they are entitled to out of the Nation's resources. Congress alone can formulate policies founded upon economic realities . . . .") (quoted in part in Special Study Group on Transportation Policies in the United States, Senate Comm. on Commerce, National Transportation Policy, S. Rep. No. 445, 87th Cong., 1st Sess. at 450, 477 (1961) (*"Doyle Report"*), *overruled by Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977); *McCarroll v. Dixie Greyhound Lines, Inc.*, 309 U.S. 176, 188-89 (1940) (Black, J., dissenting) (articulating need for congressional control over state taxation of interstate commerce) (*quoted* in *Doyle Report, supra*, at 473).

[25] While petitioners brought it to the attention of the Fourth Circuit on brief and on petition for rehearing, *James* was not cited, let alone distinguished, in the decisions below.

James involved a challenge to Minnesota's taxation of railroad property. The district court had dismissed the complaint for lack of jurisdiction on the theory that "the dispute [was] one that challenged 'the appropriateness of Minnesota's chosen valuation method' " and that section 11503 "did not give it the authority to make such an assessment." 911 F.2d at 1299. As authority, the district court in *James*—like the Fourth Circuit in this case—had relied on footnote 5 of *Oklahoma Tax Commission* and on *Union Pacific*. *See id.* at 1300-01.

The Eighth Circuit reversed. It initially noted that the parties' stipulation "at least arguably framed the issue as one involving application of an accepted methodology," which was clearly "sufficient to survive the jurisdictional hurdle." *Id.* at 1301. The court, though, was obviously skeptical of the purported distinction between methodology and application. *See supra*, at 19. The Eighth Circuit went on to state that even if the case might require "competing methodologies" to be weighed against one another, the railroad "unquestionably has presented a colorable allegation that the methodology used by Minnesota has resulted in a discriminatory tax. That allegation alone is sufficient to establish subject matter jurisdiction." *Id.* at 1301.

The Eighth Circuit also found the district court's reliance on *Union Pacific* to have been misplaced and, relying on *Oklahoma Tax Commission*, rejected the proposition that a state's valuation methodology may be " 'disturbed' " only if " 'chosen with the intent of overvaluing railroads.' " *Id.* at 1301 (quoting *Union Pacific*, 716 F. Supp. at 557). Finally, the Eighth Circuit concluded that the "common law principle of federal deference to state tax schemes, as amplified by 28 U.S.C. § 1341, has no place in a section [11503] analysis," because subsection 11503(c) "explicitly forecloses reference to § 1341." *Id.* at 1300.

The positions of the Fourth and Eighth Circuits are thus essentially opposed on the question presented by this case.[26] The disarray in the lower courts is, predictably, expanding. Since the decision below, at least one other district court has elected to adopt the Fourth Circuit rule, again relying on footnote 5 of *Oklahoma Tax Commission* and on the *Union Pacific* case. *See Burlington N. R.R. v. Department of Revenue of the State of Washington*, Nos. C89-518(T)WD & C90-5417(T)WD, slip op. at 6-7 (W.D. Wash. Nov. 27, 1991). That court conceded that it "may not be possible to draw a bright line between an attack on the state's methodology and an attack on its application of that methodology," but found nonetheless that such a distinction was warranted because of the factors addressed by the Fourth Circuit below and a Washington statute giving a "presumption of correctness" to state assessments. *Id.*

On the other hand, a California district court has continued to reject the contention that a state's "selection of a valuation methodology" is insulated from challenge. *ACF Indus. v. California Bd. of Equalization*, No. C-89-3449, slip op. at 25 n.3 (N.D. Cal. Sept. 13, 1991). That court noted that this issue had been left undecided in *Oklahoma Tax Commission*, but "permitted the plaintiff

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[26] There is some indication that the Ninth Circuit, like the Eighth Circuit, does not exclude methodology challenges from the scope of section 11503. In *Atchison, T. & S. F. Ry. v. Board of Equalization*, 795 F.2d 1442 (9th Cir. 1986), *abstention order vacated in* 828 F.2d 9 (9th Cir. 1987), the Ninth Circuit summarized the district court's findings, noting:

> In Phase I the district court conducted a thorough study of the Board's methodology, including a comparison of the methodology for railway property and that for other commercial and industrial property. . . . The court found no discrimination.

Id. at 1445 n.8. While this part of the district court's decision apparently was not appealed, it is significant that the Ninth Circuit made no comment on the fact that the district court allowed a challenge to methodology to proceed.

to introduce evidence related to both" methodology and application, in large part because it found the asserted distinction between the two to be meaningless. *Id.* at 27 n.4. Thus, the California district court found it easier to decide from all the evidence before it what the true market value of the plaintiff's property actually was than to sort out the methodology-versus-application dispute.

As these cases show, the issue left open by the *Oklahoma Tax Commission* footnote has proven to be far from hypothetical. Some courts have used the very fact that the issue was reserved by this Court as a substitute for textual analysis of the statute, enabling them to escape a task they find unattractive but Congress has required them to perform. Other courts have followed the literal mandate of the statute, and there clearly is no middle ground.[27]

The time for review is now. A safe harbor for methodology-based discrimination will prove to be no small loophole in the statute. If the Fourth Circuit's decision is not overturned, states and localities, working with expert consultants, can surely be expected to devise "methodologies" tailored to their own circumstances and designed to result in substantial overvaluation of railroad property. This case, which was disposed of by the court below on jurisdictional grounds, presents the issue cleanly, unencumbered by factual disputes. Because of the importance of this issue, prompt review by this Court is needed to end the confusion in the lower courts and to preserve the integrity of the statute.

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[27] The only intermediate position that has been suggested—that methodology-based discrimination may be challenged, but only when it is intentional—is plainly untenable under *Oklahoma Tax Commission*. *See supra*, at 18-19 & n.22.

CONCLUSION

For these reasons a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

BETTY JO CHRISTIAN
(Counsel of Record)
TIMOTHY M. WALSH
JERALD S. HOWE, JR.
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-8113

Of Counsel:

CHARLES A. HARTZ, JR.
RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY
2134 West Laburnum Avenue
Richmond, Virginia 23227
(804) 257-3235

EVERETT B. GIBSON
EVERETT B. GIBSON LAW FIRM
950 Morgan Keegan Tower
50 N. Front Street
Memphis, Tennessee 38103
(901) 576-8211

JAMES P. PETER
COURTNEY GEORGE HYERS
CSX CORPORATION
1 James Center
901 E. Cary Street
Richmond, Virginia 23219
(804) 782-1422

WILLIAM H. ALLEN
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-5420

HENRY C. WOLF
NORFOLK SOUTHERN CORPORATION
Three Commercial Place
Norfolk, Virginia 23510-2191
(804) 629-2370

JAMES W. MCBRIDE
LAUGHLIN, HALLE, MCBRIDE, LUNSFORD & FLETCHER
1211 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 331-8501

January 23, 1992

Attorneys for Petitioners

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 90-2920

CHESAPEAKE WESTERN RAILWAY; CSX TRANSPORTATION, INCORPORATED; INTERSTATE RAILROAD COMPANY; NORFOLK & WESTERN RAILWAY COMPANY; RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD COMPANY; SOUTHERN RAILWAY COMPANY,

Plaintiffs-Appellants,

v.

WILLIAM H. FORST, Tax Commissioner, Virginia Department of Taxation, His Successors in Office; DAVID E. JORDAN, Assistant Director, Property Tax Division, Virginia Department of Taxation, His Successors in Office; CITY OF ALEXANDRIA; COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA; COUNTY OF FAIRFAX; COUNTY OF PRINCE WILLIAM, VIRGINIA; COUNTY OF HANOVER, VIRGINIA,

Defendants-Appellees.

Argued April 11, 1991

Decided July 12, 1991

Before ERVIN, Chief Judge, PHILLIPS, Circuit Judge, and HAMILTON, District Judge for the District of South Carolina, sitting by designation.

OPINION

PHILLIPS, Circuit Judge:

Chesapeake Western Railway and several other railroads which operate in Virginia appeal the decision of

the district court granting summary judgment on behalf of the state tax commissioner and upholding Virginia's method of valuing railroad property. The companies contend that Virginia's valuation method for railroad property impermissibly discriminates against railroads by valuing railroad property in excess of its true market value. This, they contend, violates § 306 of the Railroad Revitalization and Regulatory Reform Act (the 4-R Act), Pub.L. No. 94-210, 90 Stat. 54, now codified at 49 U.S.C. 11503.[1] Because we hold that challenges to state valuation methods are not cognizable under § 306, we now affirm.

I

From early in this century until the 1984 tax year, the state of Virginia assigned the responsibility of assessing railroad property, for the purposes of *ad valorem* taxation, to the Virginia State Corporation Commission (SCC). The SCC was assigned the task of valuing railroad property at fair market value. In compliance with this mandate, the SCC adopted two methods for valuing railroad property: one for railroad land, and another for railroad property other than land. First, with respect to railroad land, the SCC calculated fair market value by comparing the property with adjacent or nearby industrial and commercial property. This is known as the "across-the-fence" or "over-the-fence" valuation method because it bases the best use and value of the railroad property on the use and value of the land across the fence from the railroad land. The value of railroad property other than land, on the other hand, was based on the original investment in the property, minus a fixed percentage of that investment—varying depending on the particular

[1] Section 306 was originally codified at 49 U.S.C. § 26c, but in 1978 Congress called for recodification of the Interstate Commerce Act. The statute calling for recodification did not make any substantive changes in § 306. *Clinchfield R.R. v. Lynch*, 700 F.2d 126, 128 n. 1 (4th Cir.1983). For the purposes of this opinion, we will simply refer to § 306.

property involved—as allowance for depreciation. These two methods are examples of what is known as the "inventory and summation" approach to assessment.

In 1984, the Virginia legislature transferred the responsibility for assessing railroad property to the Virginia Department of Taxation (DOT). The DOT decided to abandon the SCC's inventory and summation approach, replacing it with the "unit method" of valuation. Under the unit method, the entire railroad is valued as a single property unit, based on the business value of railroad operations. The value of the railroad's property within a given state is then determined based on the proportion of the railroad's total operation which exists within that state. Similarly, the value of the railroad property within any given locality is proportionately based on the extent of that railroad's presence in the locality.

Dissatisfied by the lower tax revenue produced by the unit method, the City of Alexandria and the County of Arlington filed suit in state court to enjoin the use of this method. They argued that use of the unit method of valuation violated the Virginia constitution because it failed to determine the fair market value of railroad property. The Virginia Supreme Court agreed with Arlington and Alexandria. It held that the unit method constituted a business tax rather than a real property tax, and it struck down its use as unconstitutional. *County Board v. Virginia Dep't of Taxation*, 393 S.E.2d 194 (Va.1990). In 1990, the state reverted back to the inventory and summation method, assessing values in the same fashion as the SCC had done prior to 1984.

Appellant railroads proceeded to file suit in the District Court for the Eastern District of Virginia, charging that valuation of railroad property under the inventory and summation methods resulted in such property being assessed at a value greater than true market value. Noting that all other property in the state is valued

at or below fair market value, the railroads argued that Virginia's tax scheme resulted in discriminatorily high taxation of railroad property, in violation of § 306 of the 4-R Act. The district court granted summary judgment to the defendants, finding that "the language and legislative history of the Act make clear that it does not impose a particular method of taxation on the state" and that the expert opinions offered were not sufficiently conclusive to create a factual issue on the question of discriminatory taxation. The railroads now appeal.

II

The railroads argue that the tax scheme discriminates against railroad property in violation of § 306 of the 4-R Act.[2] Section 306 states that:

> [i]t is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:
>
> (a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

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[2] This is not the first time this claim has been brought against the state. In *Richmond, F. & P. R.R. v. State Corp. Comm'n*, 336 S.E.2d 896, 896-97 (Va.1985), one appellant in this case presented a § 306 discrimination claim before the Virginia Supreme Court. The Court rejected the claim. No issues of collateral estoppel appear to have been raised here.

Section 306 also specifies that:

> no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction.

The railroads argue that the methods of valuation currently employed by Virginia to determine "true market value" of railroad property in fact produce property values which are far in excess of "true" market value. If the railroads are correct, this means that the ratio of assessed value to true market value for railroad property is therefore greater than one. The parties agree that all other property in the state is assessed at, or below, true market value. Thus, for all property other than railroad property, the ratio of assessed value to true market value is less than, or at most equal to, one. In light of this alleged disparate treatment of railroad property, the railroads argue that Virginia's tax assessment scheme violates § 306.

The question before us is whether § 306 provides a basis for a party to challenge the accounting method by which a state values railroad property. Clearly, a party may challenge a state's *calculations* of true market value, under the state's operative valuation methods, to insure that taxes are not levied discriminatorily. *Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461-63, 107 S.Ct. 1855, 1859-61, 95 L.Ed.2d 404 (1987). The Supreme Court has specifically left open the question, however, of whether § 306 allows a railroad to challenge "the appropriateness of the accounting methods by which the state determined the railroad's value." *Id.* at 463 n. 5, 107 S.Ct. at 1861 n. 5.

We believe that § 306 does not provide a basis for parties to challenge a state's preferred accounting method.

As an initial matter, we note that Congress has enacted a general proscription on federal interference in state taxation decisions. *See* 28 U.S.C. § 1341; *Burlington Northern R.R. v. Lennen*, 715 F.2d 494, 498 (10th Cir. 1983). While § 306 was passed as an express exception to the policy of non-interference, *id.*, we are not inclined to disregard this general policy in areas where § 306 does not plainly authorize such an exception and where the federal courts are ill equipped to evaluate the merits of a challenge to a state taxation scheme. The appellant's position suffers from both of these infirmities.

The Supreme Court has held that § 306 unambiguously provides a basis for railroads to challenge a state's calculation of the true market value of railroad property under whatever accounting system prevails in a given state. *Burlington Northern R.R. v. Oklahoma Tax Comm'n.* 481 U.S. at 461-63, 107 S.Ct. at 1859-61. On the other hand, the statute is not so explicit in explaining whether a railroad may challenge, in addition, the particular accounting method a state has determined to best estimate true market value. Since the statute is ambiguous on this latter question, we turn to the legislative history of § 306.

The legislative history of this section is admittedly rather thin. Nonetheless, although incomplete, the history that does exist suggests that Congress did not intend for courts to displace the state's policy choice about what constitutes the best method for determining true market value of railroad land. The committee report on Senate Bill 927 (a precursor to the legislation here) states that the bill

> does not suggest or require a State to change its assessment standards, assessment practices, or the assessments themselves. It merely provides a single standard against which all affected assessments must be measured in order to determine their relationship to each other. It is not a standard for determining value; it is a standard to which values that have already been determined must be compared.

S.Rep. No. 1483, 90th Cong., 2d Sess. app. B (1968). Similarly, a railroad representative testifying on another earlier version of the 4-R Act stated that it "would not deal with valuation being standard. The standards and methods of valuation that any State wishes to use would be totally unaffected by this legislation." *Hearing Before the Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce on H.R. 16245*, 91st Cong., 1st Sess. 138 (1970) (testimony of Philip M. Lanier), *quoted in*, *Burlington Northern R.R. v. Lennen*, 573 F.Supp. 1155, 1163 (D.Kan.1982). While we might be hesitant to rest our interpretation of § 306 on these materials alone, we are further convinced of the accuracy of our interpretation by the difficulty of judicial enforcement of any alternative understanding of the section.

The job of determining whether a particular valuation method produces a "true" market value involves, at its core, a policy choice. The concept of true market value is inherently an approximation, in some sense a fiction, since there is no such thing as a perfect market. This is particularly true of railroad land which, as the railroads point out, is subject to a good deal of regulation—actual and potential—by federal agencies. The United States District Court for the District of Utah recently has pointed this out in the course of struggling with a claim similar to the one at bar and attempting in the process to select the one valuation method that would produce a truly accurate fair market value.[3] *See Union Pacific R.R.*

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[3] Appellants suggest that they should at least be allowed to prove the present valuation system unreasonable. The problem with this argument is that § 306 does not limit state taxation schemes on the basis of their "reasonableness". It regulates them based on whether or not the ratio of assessed value to true market value of railroad property is at least five percent greater than the ratio of assessed value to true market value of all other property in the state. The statute is clearly designed to preclude a court from doing exactly what appellants request—pass judgment on the reasonableness of a

v. State Tax Comm'n, 716 F.Supp. 543 (D.Utah 1988). There, railroads challenged Utah's methodology used for valuing railroad property. The court allowed the case to go to trial, attempting to determine through the assistance of expert testimony, which valuation method best calculated the true market value of railroad property.[4] At the end of trial, after considering extensive testimony, the court realized the difficult task involved in being asked to disapprove a state's method of valuing property. The court concluded that it could not determine whether the particular valuation method used in Utah discriminated against the railroads because it had no basis for determining which method produced the true market value of railroad property.

The *Union Pacific* court noted that true market value of property is difficult, if not impossible, to ascertain. "[T]here is no absolute way to test the assertions of competing valuations or competing claims of correspondence to 'true market value,' if such a thing exists in the order of things." *Id.* at 553. The court provided a rich explanation of the problem:

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state taxation scheme—and instead is intended to limit consideration to the discrete, quantifiable task of determining the exact extent (if any) of discriminatory assessment.

[4] One particular difficulty in challenging valuation methods under § 306 is that, in order to determine whether the state is discriminating against railroads by a factor of at least five percent, a court is compelled to determine what valuation method is the correct method. That is, we cannot conclude that the state is overtaxing railroads by five percent unless we know what the correct tax would be. To determine what the correct tax would be, we must determine what the correct valuation method is. Thus, we cannot simply reject a particular method as unfair; instead, we must also find that some other specific method is not only fair, but in fact singularly *correct*. As the court in *Union Pacific* pointed out, "[t]he court's decision on valuation must recognize (at least implicitly) one valuation method at the expense of other methods." 716 F.Supp. at 552. In essence, the railroads ask us not only to reject Virginia's inventory and summation approach but also to dictate to Virginia the specific valuation method that produces the "correct" market value.

> From the six weeks of testimony in this case, however, certain things became apparent. First, valuation is an art, not a science. It is a function of judgment, not of natural law. Try as it might, even Congress is incapable of enacting either a natural law of the market or Plato's ideal. "True market value", then, must needs mean something else. Absent a miracle of time, place, and circumstance—willing buyer, willing seller, high noon, January 1, 1984, for example—true market value for the purposes of ad valorem taxation is always an estimate, always an expression of judgment, always a result built on a foundation of suppositions about knowledgeable and willing buyers and sellers endowed with money and desire, whose desires are said to converge in a dollar description of the asset. All of this is simply a sophisticated effort at "lets pretend" or "modeling", in modern jargon, and all of it involves judgment.

Id. at 554. The court also noted that "from all the evidence presented it is clear that there is more than one way to value a railroad. . . . All the methods may be equally rational given their underlying assumptions. And they are all irrational if pressed to extremes." *Id.* at 555. The court therefore concluded that the railroads could not establish that their proposed methodology of valuation was, in some absolute sense, "truer" than any other. The railroads here correctly note that the across-the-fence method of valuation used in Virginia is not employed for any property other than railroad property. They argue that the Virginia method is therefore facially inequitable since it treats railroad property like no other property in the state. Their solution—the unit method—is no better however, since no other property in the state is taxed by the unit method either. The point is that railroad property is unlike all other property in the state. Consequently, the valuation method for railroad property will necessarily differ from the methods used for other property in the state. And once one concedes that the valua-

tion of railroad property requires a different method than that used for all other property, the choice of what alternative method to use is one of pure policy, unguided by any judicially determinable notion of "correctness" or "truth".

III

We conclude that § 306 does not provide a basis for railroads to challenge a state's preferred methodology for ascertaining the true market value of railroad property. The statute simply does not authorize the judiciary to enter into the difficult task of second-guessing a state's policy assessment of how best to value property. In light of Congress' expressed preference against federal interference in state taxation policy, we believe that § 306 should be read narrowly, authorizing challenges to a state's calculation of fair market value, but not to a state's method for calculating such value. If Congress determines that one valuation methodology produces more accurate values than another, it may require states to utilize that accounting method. Section 306, however, does not authorize the courts to perform that task.

In § 306, Congress has insured that railroad and nonrailroad property will be treated similarly under whatever valuation methods have been selected by a given state. If the Congress further desires to standardize the valuation side of the taxation process, it could set out the methodologies it thinks are fairest to railroads. The courts, however, cannot make that judgment without completely displacing the fact-finding and policymaking powers of state government. The 4-R Act does not authorize the judiciary to undertake the difficult, and arguably impossible, task of determining which specific assessment methodology produces true market value of railroad property. Consequently, we affirm the order of the district court granting summary judgment.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

C.A. No. 3:90CV00484

CHESAPEAKE WESTERN RAILWAY, *et al.*,
Plaintiffs,

v.

WILLIAM H. FORST, *et al.*,
Defendants.

MEMORANDUM OPINION

[Filed Oct. 3, 1990]

This matter is before the Court on the local intervenors' motion for summary judgment and the defendants' motion for partial summary judgment, pursuant to Fed. R. Civ. Proc. 56, and on the plaintiffs' motion for preliminary injunction, pursuant to Fed. R. Civ. Proc. 65(a). On the basis of the pleadings, supporting briefs, and arguments made at the September 20, 1990 hearing, the Court hereby SUSTAINS the motions for summary judgment and partial summary judgment and DENIES the motion for preliminary injunction for the following reasons.

Factual History

This case constitutes the most recent episode of a ninety year debate between the state of Virginia and the railroads about the proper method of transportation property taxation. Throughout the course of this debate, the state and the railroads have alternately supported and opposed the legitimacy of the "unit method" of taxation, which calculates property value based upon capitalization of business operating income.

In 1983, the General Assembly transferred the responsibility for assessing railroad property in Virginia from the State Corporation Commission to the Department of Taxation. The Department adopted the unit method of assessing railroad property in Virginia beginning in tax year 1984. The Department's unit method caused the assessed value of railroad operating land to fall significantly in numerous localities in Virginia.

The County of Arlington and the City of Alexandria subsequently challenged the Department's decision to adopt the unit method. In ruling on that challenge, the Virginia Supreme Court affirmed that the unit method is improper in Virginia since it does not measure fair market value in accordance with the Virginia constitution. *County Board of Arlington et al. v. Department of Taxation*, 240 Va. 108, 393 S.E.2d 194 (1990).

As a result of the Court's determination, the Department of Taxation has indicated it intends to return to an assessment based on fair market value. Land will be assessed by comparing railroad parcels with the assessed values of other local properties. The proposed method includes equalization of railroad property assessments with other property assessments to prevent discrimination. In August, 1990, the plaintiff railroads brought an action in this Court seeking to enjoin the state from assessing rail transportation property for ad valorem taxation, for the 1990 tax year and from publishing such assessments for the use of counties and cities in Virginia in levying taxes. According to the railroads, the proposed method of taxation discriminates against the railroads in violation of 49 U.S.C. § 11503. The local intervenors, consisting of Alexandria, Arlington, Fairfax County, Prince William and Hanover, moved for summary judgment on September 13, 1990. The defendants adopted parts one and two of the local intervenors' motion for summary judgment. They excluded the equalization claim from their motion for partial summary judgment because they

were, at the time, negotiating with the railroads in an effort to resolve the equalization issue.

Analysis

The plaintiff railroads mistakenly characterize the issue presented by the dispute between the parties as one of federal preemption. The Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11503, prohibits discriminatory taxation of railway property. The language and legislative history of the Act make clear that it does not impose a particular method of taxation on the state but rather requires the state to treat different entities within its boundaries similarly for purposes of taxation.

In *County Board of Arlington, et al. v. Dept. of Taxation*, 240 Va. 108, 393 S.E. 2d 194 (1990), the Virginia Supreme Court held that the "unit method" of taxation violated the state constitution and code because it provided a business or use valuation that did not measure the fair market value of personal property or real property required by Virginia law. The plaintiff claims that the Department of Taxation's consequent shift from the unit method to a fair market value assessment scheme will result in discrimination against railroad property. However, the sole basis for the Plaintiff's claim is the opinion of a Department of Taxation representative that abandonment of the unit method will result in the assessment of transportation property at a value which bears a higher ratio to the true market value of such property than the ratio which the assessed value of all other commercial property in the same assessment jurisdiction bears to the same market value of such commercial and industrial property. Expert opinions are not sufficiently conclusive to create a factual issue. Absent factual evidence of discrimination, the plaintiff can not successfully oppose the defendant's motion for summary judgment on the basis of genuine issues of material fact.

Summary judgment is hereby entered in favor of the defendant and the local intervenors.

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

3 Oct. 1990
Date

/s/ Richard L. Williams
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

C.A. No. 3:90CV00484

CHESAPEAKE WESTERN RAILWAY *et al.*,
Plaintiffs,

v.

WILLIAM H. FORST, *et al.*,
Defendants.

ORDER

This matter is before the Court on the local intervenors' motion for summary judgment and the defendants' motion for partial summary judgment, pursuant to Fed. R. Civ. Proc. 56. For reasons stated in the accompanying memorandum opinion, the motions for summary are SUSTAINED and the plaintiff's subsequent motion for injunction pending appeal is DENIED. The parties are hereby authorized to file whatever depositions they consider necessary to complete the record.

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

Oct. 3, 1990
Date

/s/ Richard L. Williams
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

C.A. No. 3:90CV00484

CHESAPEAKE WESTERN RAILWAY *et al.*,
Plaintiffs,

v.

WILLIAM H. FORST, *et al.*,
Defendants.

FINAL ORDER

This matter is before the Court on the plaintiffs' motion for preliminary injunction, pursuant to Fed. R. Civ Proc. 65(a), and on the local intervenors' motion for summary judgment and the defendants' motion for partial summary judgment, pursuant to Fed. R. Civ. Proc. 56. For reasons stated in the accompanying memorandum opinion, the motions for summary judgment are SUSTAINED and the motion for preliminary injunction is DENIED. The parties are hereby authorized to file whatever depositions they consider necessary to complete the record.

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

3 Oct. 1990
Date

/s/ Richard L. Williams
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
September 24, 1991

No. 90-2920

CHESAPEAKE WESTERN RAILWAY; CSX TRANSPORTATION, INCORPORATED; INTERSTATE RAILROAD COMPANY; NORFOLK & WESTERN RAILWAY COMPANY; RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD COMPANY; SOUTHERN RAILWAY COMPANY,

Plaintiffs-Appellants

v.

WILLIAM H. FORST, Tax Commissioner, Virginia Department of Taxation, His Successors in Office; DAVID E. JORDAN, Assistant Director, Property Tax Division, Virginia Department of Taxation, His Successors in Office; CITY OF ALEXANDRIA; COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA; COUNTY OF FAIRFAX; COUNTY OF PRINCE WILLIAM, VIRGINIA; COUNTY OF HANOVER, VIRGINIA,

Defendants-Appellees

On Petition for Rehearing with Suggestion for Rehearing In Banc

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Appellants filed a petition for rehearing with suggestion for rehearing in banc along with a motion for leave to file addendum to the petition. No member of the Court

requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc and the motion for leave to file addendum.

Entered at the direction of Chief Judge Ervin, with the concurrence of Judge Phillips and Judge Hamilton.

For the Court,

/s/ John M. Greacen
Clerk

STATUTE INVOLVED

§ 11503. Tax discrimination against rail transportation property

(a) In this section—

(1) "assessment" means valuation for a property tax levied by a taxing district.

(2) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.

(3) "rail transportation property" means property, as defined by the Interstate Commerce Commission, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(4) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(c) Notwithstanding section 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the Untied States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section—

(1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district.

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 3:90 CV 00484

CHESAPEAKE WESTERN RAILWAY, *et al.*,
Plaintiffs,

vs.

WILLIAM H. FORST, ETC., *et al.*,
State Defendants,

THE CITY OF ALEXANDRIA, VIRGINIA, *et al.*,
Local Defendants.

September 14, 1990
Richmond, Virginia

The deposition of DAVID E. JORDAN, taken at the instance of the plaintiffs, before Carol Hill, a Notary Public for the State of Virginia at Large, beginning at 11:30 a.m., at the offices of CSX Corporation, James Center, 901 East Cary Street, Richmond, Virginia; said deposition taken pursuant to the Federal Rules of Civil Procedure.

APPEARANCES:

Everett B. Gibson, Esq.
950 Morgan Keegan Tower
50 North Front Street
Memphis, Tennessee 38103
Counsel for the plaintiffs

Francis A. Cherry, Esq.
Randolph, Boyd, Cherry & Vaughan
14 East Main Street
Richmond, Virginia 23219
Counsel for the plaintiffs

Charles A. Hartz, Jr., Esq.
Richmond, Fredericksburg & Potomac
Railroad Company
P.O. Box 11281
Richmond, Virginia 23230
Counsel for the plaintiffs

Courtney L. George, Esq.
CSX Transportation
500 Water Street
Jacksonville, Florida 32202
Counsel for the plaintiffs

Barbara M. Rose, Esq.,
Senior Assistant Attorney General
James G. Council, Esq.,
Assistant Attorney General
101 North 18th Street
Richmond, Virginia 23219
Counsel for the State defendants

Thomas W. McCandlish, Esq.
Mezzullo & McCandlish
700 East Main Street, Suite 804
Richmond, Virginia 23219
Counsel for the local defendants

Cynthea L. Perry, Esq.
#1 Courthouse Plaza, Siute 403
2100 Clarendon Boulevard
Arlington, Virginia 22201
Counsel for the local defendants

[4] DAVID E. JORDAN, a witness, called by the plaintiffs, first being duly sworn, testified as follows:

EXAMINATION BY MR. GIBSON:

Q Tell us your name and home address, please.

A David E. Jordan, 9002 Splitwood Circle, Richmond, Virginia 23229.

Q Mr. Jordan, you're employed by the Virginia Department of Taxation?

A Yes.

Q What is your present position?

A Assistant director of the Property Tax Division.

Q When did you take over that title?

A I think it was in April 1989.

Q What was your position with the department immediately preceding that?

A Railroad and pipeline appraisal manager.

Q The position now occupied by Mr. Mawyer?

A Essentially the same position, yes.

Q Are you still involved in the appraisal of railroad and pipeline property notwithstanding your promotion?

A I'm involved with it but to a lesser degree than I once was.

* * * *

[11] Q Were you aware of valuation issues by the time you and the Commissioner and Mr. Forberg began discussing it? Obviously, you were.

A Yes.

Q What were the issues that you saw at that time?

A Well, I think the first thing that struck me was the inconsistency, or what I regarded at the time as an inconsistency, let me say, between the application of a land value to the railroad right-of-way that was derived by looking at an alternative use for the railroad and then the compounding of that by placing a value upon the [track] as though both uses could exist simultaneously.

[12] Q The land use being used for one purpose and the [track] devoted for an entirely different purpose?

A That's correct.

Q Is there a doctrine or an appraisal principle known as the consistent use doctrine?

A Yes.

Q Would you define that for us?

A Consistent use principles would say that you must be consistent between the use of the land and your assumptions as to the use of the land, and the use of the improvements on the property.

Q Which valuing for one purpose as commercial property and valuing for another purpose as railroad [track] would violate, in your opinion?

[Colloquy regarding objection omitted]

[13] A I think, to answer your question or to begin to answer it, we're getting close to an area where the distinction between the unit method and the inventory and summation method becomes more evident.

I'm advised that I need to answer your questions. I wanted to state that the law in Virginia has been decided by the Virginia Supreme Court, and as an employee of the Department of Taxation, I'm obliged to defend those assessments that are being made pursuant to that ruling as best I can, and that my personal views on the matter are well-known and well-documented and irrelevant to this proceeding.

Q Now, having stated that, would you answer my question? I appreciate the spot you're in. I understand it.

A It is a violation of the principle of consistent use.

Q That first issue, as you recall, cropping up in your mind, the inconsistency, relates primarily to the across-the-fence value for land; is that right?

[14] A Yes.

Q Did you find other problems, valuation issue problems, in the SCC methodology as applied to railroad valuation besides just across-the-fence value?

A Yes. In the land value, itself, the parcelization of the railroad right-of-way led to some conclusions that just intuitively did not make sense.

Q Tell me with more precision exactly what you mean by that.

A Well, the across-the-fence methodology would say that if you had railroad parcel A and railroad parcel B and adjoining that you had non-railroad parcel C and non-railroad parcel D, that railroad parcel A must equal in value to non-railroad parcel C, and that railroad parcel B must equal in value to non-railroad parcel D.

Q Because they're contiguous to one another?

A Because they are contiguous. And C and D aren't necessarily the same. One could be a junkyard, and the other could be a hotel, high-rise hotel, and so we end up in a situation where the only two parcels that are alike in this whole situation are the railroad parcels A and B, and we have a methodology which says that they cannot be the same value.

Q In this parcelization process that is required under the across-the-fence value, do you really have railroad parcels A and B in reality?

[15] A In my opinion, no.

Q Let's take the Richmond, Fredericksburg & Potomac Railroad as an example. You're familiar, of course, with that railroad?

A More than I would like to be.

Q What, in your appraisal judgment, is the parcel of land, that is, the parcel to be evaluated for fair market value purpose?

[Colloquy regarding objection omitted]

A It's one parcel.

Q From where to where?

A From the south end of Long Bridge to the middle of the James River.

Q Long Bridge is over the Potomac?

A That's correct.

* * * *

[24] Q After confronting these issues, discussing them with Mr. Forberg and Commisisoner Forst, what conclusion did you reach as to how railroads should be valued for ad valorem tax purposes at fair market value?

[25] A My conclusion was the unit method was the only appropriate methodology which could be employed to value—to determine the fair market value of a railroad.

Q You accordingly did appraisal work under the unit method until the Supreme Court decision in June of this year?

A Yes.

* * * *

[33] Q Is there a recognized term in the appraisal field as special use property?

A Yes.

Q How would you define special use property?

A Well, special use or special purpose property is generally property which is adopted or designed for one particular purpose and cannot be made readily available for another purpose.

Q What about railroad property, is it special use property?

[34] A I think most appraisers consider railroad property to be special purpose property.

Q In general, Mr. Jordan, what is considered the highest and best use of special use property for the purpose of determining fair market value—

[Objection omitted]

Q —in your personal view?

A Generally, it's continued use and the present use.

Q Did you make a highest-and-best-use determination of the property of the six railroads that are involved in

this litigation for tax years 1984 through 1990, up to June 8, 1990?

A Well, some of those periods would have been done by Mr. Mawyer, but a determination was made.

Q What elements did you look at, under your supervision, did Mr. Mawyer consider to determine the highest and best use of railroad property in appraising that property in Virginia, railroad operating property?

A The same elements that we talked about before are always the things that have to be considered.

Q Well, you said one, I believe, was legal permissibility?

A Yes.

[35] Q How does that particular element relate to railroad operating property?

A Well, the Interstate Commerce Commission—

[Colloquy regarding objection omitted]

A My understanding as an appraiser is that the Interstate Commerce Commission has the ability to require railroads to connect and to interchange cars, and, that is, once something is part of an international rail system, it cannot simply get out of the rail business. That argues in favor of continued use as railroad property.

Q Are there economic considerations which argue in favor of continued use as railroad property, economic feasibility considerations?

A Well, certainly, if you look at the entire railroad, there's nothing else that really looks like a railroad. It's hard to—It's difficult to envision a use made of the mass of the property which would be something which would be economically feasible which would be something other than a railroad.

[36] Q Physical possibility, is that another element that bears on the determination of highest and best use of railroad property, railroad operating property?

A Yes, I think it does, to a certain extent, because if you could identify—you could identify a part of a rail-

road that could possibly be economically feasible to do something else with, but you can't sever the railroad in the middle of the railroad track and leave a gap in the system.

So, basically, with the exception of some yard properties that can be differentiated, then the system has to remain intact.

So you have a problem with physical—I guess that goes to the issue of economic feasibility as well as physical possibility.

Q One other consideration I want to ask you about. What about the reasonable probability of an alternative use, is that a consideration which you took into account in determining highest and best use for the railroad operating property?

A Well, since we have had a national rail system for many, many years, we have a federal agency, part of which its responsibility is to ensure the continuation of that.

There has been a great deal of legislation in a great many years with the Four-R Act and [Staggers] Rail Act that—all of which would lead a reasonable person to [37] conclude that the railroads have been there a long time and they are going to continue to be here a long time.

So if a railroad is—if a particular railroad is not just absolutely losing money like pouring water out of a boot, then the chances are it's going to continue to be a railroad.

Q Mr. Jordan, are there any unique characteristics of the railroad operating property which would lend unit method appraisal techniques appropriate for railroad property where you might not use it for other types of businesses, like maybe IBM or General Motors or something like that?

A Sure.

Q Tell us what those unique characteristics are.

A Well, the property that IBM owns is severable from IBM.

Q They can shut down plants?

A That's right. They do, I assume. I know other corporations, such as Dupont or Allied Chemical, companies that have presences (sic) here in Virginia, open up, shut down, move out very frequently parts of their corporation.

It's difficult to do with a railroad because of the interdependence of the various parts of the system.

* * * *

[39] Q If you carry out the assessment that the department intends to carry out for 1990 for these plaintiff railroads, in your opinion, will the assessment of these railroads transportation property bear a higher ratio to the true market value of these railroad transportation property than the ratio which the assessed value of all other commercial and industrial property in Virginia bears to the true market value of such other commercial and industrial property?

MS. ROSE: Objection.

MR. McCANDLISH: Are you defining fair market value under Virginia law?

MR. GIBSON: No, fair market value under appraisal theory.

MR. McCANDLISH: Wholly apart from Virginia law and on the basis of his personal opinion?

MR. GIBSON: That is correct.

A On the conditions stated by Mr. McCandlish, the inventory and summation assessments will be in excess of what, in my personal opinion, would be the market value of those rail systems.

Q In your personal opinion, what you know from ratio [40] study evidence and other evidence from the department's records, will commercial and industrial property other than railroad property likely be assessed for no more than fair market value for 1990?

A That's correct.

Q And will the differential, in your personal opinion, between the assessment level of commercial and industrial property other than railroad property be exceeded by the assessment level of railroad property by more than 5 percent?

A Most probably

MR. GIBSON: I have no further questions.

MS. ROSE: I have no questions.

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